

Docket No.: 02-0160
Bench Date: 4/24/02
Deadline: 5/8/02

MEMORANDUM

TO: The Commission

FROM: Leslie Haynes, Administrative Law Judge

DATE: April 23, 2002

SUBJECT: Z-Tel Communications, Inc.
-vs-
Illinois Bell Telephone Company, d/b/a Ameritech Illinois,

Verified Complaint and Request for Emergency Relief
Pursuant to Sections 13-514, 13-515 and 13-516 of the
Illinois Public Utilities Act.

RECOMMENDATION: Enter the attached Written Decision granting a modified form of the relief requested.

This matter concerns a Complaint filed by Z-Tel Communications, Inc. ("Z-Tel") against Illinois Bell Telephone Company d/b/a Ameritech Illinois ("Ameritech") pursuant to Section 13-514, 13-515 and 13-516 of the Act. In the Complaint, Z-Tel alleges that Ameritech provides untimely, inaccurate, unreliable and discriminatory notice to Z-Tel when a Z-Tel customer migrates to an alternative local exchange carrier.

The deadline for Commission action is May 8, 2002. The Commission, however, should not act prior to the time for parties to file a petition for review (April 28th) and responses to a petition for review (May 1st).

Z-Tel filed a Motion for Oral Argument with its Reply Brief. Z-Tel requests oral argument to address the Line Loss Notification process and how Ameritech does or does not use that process to generate Winback marketing material. In considering this, I remind the Commission that it must make its final decision by May 8th.

The ALJ's Decision

The attached Decision finds that Z-Tel has met its burden and shown that Ameritech has violated Sections 13-514(2)(6)(9)(11) and 13-801 of the Act. The faulty provisioning of the 836 LLNs as well as the provisioning of the enhanced LLNs to its Winback personnel constitute violations of the Act.

Ameritech does not dispute that there are problems with the 836 LLN process or that its Winback personnel receive a notice that is processed in a different manner or that includes additional information. Ameritech contends, however, that this does not amount to a violation of the Act. Ameritech argues that a showing of intent to impede competition is required. Ameritech further contends that it has acted reasonably to address Z-Tel's concerns and to correct the line loss notification problems.

The attached Decision finds that Ameritech's behavior is a per se impediment to competition. Ameritech's discriminatory LLN has a direct and negative effect on competition by allowing Ameritech to gain an advantage in its Winback marketing efforts. Consistent with the finding that Ameritech has violated the Act, Z-Tel is entitled to remedies for the harm it has suffered as a result of Ameritech's behavior.

Several of the requests for relief that Z-Tel makes are granted with only slight modifications, such as compensation for Z-Tel's costs for investigating double billing trouble tickets, the customer notification letter and Z-Tel's request for attorney's fees and costs of bringing this action. Other requests, such as overbilling and indemnification, I believe are appropriate, however the exact procedures and relief allowed are governed by the parties' Interconnection Agreement. The Decision denies Z-Tel's request for damages for harm to reputation and administrative expenses. It is Z-Tel's burden to prove its damages and Z-Tel has provided no evidence in support of this request.

It also became clear during this proceeding that the performance measure, MI 13, that measures the 836 LLN process is inadequate. The Decision directs Ameritech to correct the problems that Staff identified and to provide reports to the Commission regarding its improvement of this performance measure.

The Decision also leaves the emergency relief granted by the Commission in its Order of March 13, 2002, in place until such time as Ameritech files a report showing that it is providing 836 LLNs in a timely and accurate manner. This report will be reviewed by Staff and in the event that Staff does not file anything disputing Ameritech's report, the emergency relief will end.

An important part of this Decision is determining how the LLN system will be brought into parity. Z-Tel proposes several steps to accomplish this. First, Z-Tel requests, as interim relief, that Ameritech Winback be required to rely solely on the 836 LLN. The attached Decision grants this relief. Z-Tel also requests that this be extended to require Ameritech's billing systems to rely solely on the 836 LLN. Staff does not support this request because of the potential harm to consumers. The attached Decision denies this request for that very reason.

With respect to parity, Z-Tel also requests that it be provided with the identical and instantaneous data from Ameritech's ASON system that Ameritech provides to its own retail databases. Staff proposes a similar change to Ameritech's systems by recommending that Ameritech should make available to Z-Tel the option to receive the

same information as Ameritech provides to its retail organization today in the form of the loss disconnect report in addition to receiving the 836 LLN. Although neither Staff nor Z-Tel provide specifics, I adopted Staff's proposal which appears more appropriate because, as I interpret it, it would require Ameritech to provide the option for Z-Tel to receive another LLN that contains more information. The Decision also allows Ameritech Winback to use the enhanced LLN again once it offers a similar option to Z-Tel.

With respect to penalties, the attached Decision finds that penalties are appropriate, for Ameritech's violation of 13-801 of the Act, pursuant to Section 13-304 and 13-305 of the Act and initiates a proceeding to determine the correct amount. Ameritech, in its Reply Brief, argues that it has acted reasonable and should not be subject to penalties. I believe that these arguments are more appropriately considered in the penalty proceeding, where mitigating factors will be considered.

For Ameritech's violation of 13-514, the Decision denies penalties pursuant to Section 13-516(a)(2). The language of Section 13-516, states that:

Notwithstanding any other provision of this Act, for a second and any subsequent violation of Section 13-514 committed by a telecommunications carrier after the effective date of this amendatory Act of the 92nd General assembly . . . The second and any subsequent violation of Section 13-514 need not be of the same nature or provision of the Section for a penalty to be imposed . . . Each day of a continuing offense shall be treated as a separate violation for purposes of levying any penalty under this Section. (220 ILCS 5/13-516(a)(2)).

I interpret the statute to give telecommunications carriers what is essentially "one free bite". The General Assembly intended to punish repeat offenders and therefore, telecommunications carrier get "one free bite" after the Act was amended in 2001. Under this theory, since the Commission has not found Ameritech in violation of the Act prior to this proceeding, penalties may not be imposed.

I note that this is a case of first impression. This language, which the Commission has not yet interpreted, could arguably be read to mean that penalties under 13-516(a)(2) are allowed in this proceeding. Because Ameritech is found to violate 13-514(2)(6)(9) and (11) in this proceeding, this could be Ameritech's 1st, 2nd, 3rd and 4th violations of the statute. Therefore, Ameritech could be subject to 13-516 penalties for its 2nd, 3rd and 4th violations of 13-516.

Although I believe penalties are warranted for Ameritech's actions with respect to LLNs, I do not believe that 13-516 allows them in this instance. If, however, the Commission disagrees with my interpretation of 13-516 and finds that Ameritech's violation of multiple sections of 13-514 constitutes the first, second, third and fourth

violation by Ameritech, it is not necessary at this time to decide the amount of penalties. That would be decided in a separate proceeding under Section 766.410 of the Commission's rules. Hence, the Commission would have to initiate a proceeding, pursuant to Section 766.410, to determine the amount of remedies to be imposed on Ameritech.

Therefore, I recommend that the Commission enter the attached Decision which finds Ameritech to have violated Sections 13-514 and 13-801 of the Act and grants a modified form of the relief requested by Z-Tel.

LH:jt